No. [redacted] 127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA,

Petitioner,

vs.

CHARLES E. O'MALLEY, CLAUDE G. ALEXANDER and PETER G. FARROW, as executors of the will of EDWARD H. FARRICE, deceased,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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I.

An Important Question of Federal Law Is Not Involved Here

This case does not involve an important question of federal law which should be settled by the Supreme Court of the United States.

Since 1931, the internal revenue statutes of the United States have contained, in substance, the same provisions of Section 811 of the 1939 Internal Revenue Code which are

in question here. Despite this fact there have been in the ensuing thirty-five years less than a handful of litigated cases which involve, even incidentally, the narrow issue which petitioner seeks to have this Court resolve.

Not only are the cases few in number, but the amount of revenue involved in this type of case must ordinarily be relatively small. The aggregate income likely to be accumulated at the discretion of the trustees from the time a trust is created until the death of the settlor should, as a rule, be far less than the amount of corpus originally transferred to the trust. In *Round* v. *Commissioner*, 332 F. 2d 590, 592 (C.A. 1st) the accumulated income was substantially less than the corpus, as was the case in *Commissioner* v. *McDermott's Estate*, 12 TCM 481, aff'd 222 F. 2d 665 (C.A. 7th). This case is unusual in that the accumulated income exceeded the value of the property originally transferred to the trust. This is, in brief, an uncommon case involving a seldom litigated point of tax law.

Nor can it be said that the decision below of the Court of Appeals for the Seventh Circuit opens the way to tax avoidance. Under the facts of this case, Mr. Fabrice, the settlor, created five trusts in which he retained only the power, in conjunction with two co-trustees, to distribute or accumulate the trust income. Fabrice retained no power to revoke, change or modify the terms of the trusts for his own benefit, or in a way by which he could ever acquire any interest in the corpus or income of the trusts. Nevertheless, the retained power concededly made the corpus of the trusts includable in Fabrice's estate. Had Fabrice merely given exclusively to his co-trustees (who could have out-voted him on this point in any event) the retained power to distribute or accumulate income, it would be beyond doubt that neither the value of the accumulated income nor of the corpus would be included in his gross

estate. Under these circumstances, it must be considered a mere fluke that Fabrice retained the costly power to participate in the vote to distribute or accumulate income. Surely this Court should not anticipate that one interested in tax avoidance would deliberately retain so restricted a power if the price is the certain taxability of corpus and the possible taxability of accumulated income. The decision below certainly does not offer a feasible tax avoidance device.

Furthermore, the issue presented by this case is extremely narrow. It requires a definition of the word "transfer" as used in one subsection of the 1939 Internal Revenue Code relating to situations where the settlor of a trust retains one narrow and limited power. Hearing and deciding this case would not enable this Court to establish any important principle to aid in the general enforcement of the tax laws, as did this Court's most recent estate tax case, *Commissioner* v. *Estate of Noel*, 85 Sup. Ct. 1238 (1965), decided earlier this term.

II.

The Decision Below is Correct

Section 811(c)(1)(B)(ii) of the 1939 Internal Revenue Code includes in a decedent's gross estate the value of all property to the extent of any interest therein of which "the decedent has at any time made a *transfer*". The Court below correctly held that the decedent never "transferred" the accumulated income. To argue, as petitioner does, that the original transfer of corpus was incomplete under the authority of *Commissioner* v. *Church*, 335 U.S. 632 and *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, is to misread those decisions. In the former, the settlor was the income beneficiary until his death. In the latter, a gift tax

case, the settlor reserved the right "to modify any or all of the trusts" in any way not beneficial to himself. The Court emphasized that the donee could be made liable for the gift tax but that under the reserved power the identity of the donee could not be ascertained until the settlor's death, 308 U.S. 46. Neither decision fits the facts here.

Moreover, if the transfer is to be deemed incomplete, should not distributed income, as well as accumulated income, logically be caught in petitioner's deep net? That petitioner does not press for this logical extension would indicate that its premise of an "incomplete" transfer is not sound. That premise was, of course, expressly rejected below and petitioner's request for re-hearing *en banc* was denied *en banc* by five of seven judges.

Petitioner states at page 8 of its petition that the Seventh Circuit's *McDermott* decision 222 F.2d 665 has been criticized by legal scholars. The decision has also been approved and more than one writer has cogently urged that the problem is legislative, not judicial. See notes, 54 Michigan Law Review 577, 579; 1955 Univ. of Illinois Law Forum 779, 782; and 51 Northwestern Univ. Law Review 149, 153-154.

CONCLUSION.

It has never been the function of this Court merely to review cases for possible error. Because of its limited time, the Court must hear and decide only those tax cases which involve considerable amounts of revenue or which require the enunciation of general and continuing principles of tax law. This case involves none of these factors and although its narrow issue has been differently decided in

various circuits, that alone does not make this case meet for Supreme Court consideration. Moreover, the decision below is correct.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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